

Hamill, Elizabeth

Attachments: White Paper on License Exception STA.pdf

From: Kapla, Robert
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To: Urbancic, Frank C
Cc: 'Valentine, Maria D'
Subject: White Paper on License Exception STA

Mr. Ambassador

As discussed, attached is a brief white paper on the License Exception STA matter.

Sincerely,

Robert

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White Paper on License Excepti...

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March 30, 2011

**THE UNITED STATES POLICY OF PROHIBITING ARMS TRANSFERS TO CYPRUS
IS IRRELEVANT TO THE ELIGIBILITY OF CYPRUS TO RECEIVE
PRODUCTS EXPORTED FROM THE UNITED STATES UNDER
AUTHORITY OF THE EXPORT ADMINISTRATION REGULATIONS**

On December 9, 2010, the U.S. Department of Commerce, Bureau of Industry and Security published a proposed rule in the Federal Register that would create a new license exception under the Export Administration Regulations (EAR).¹ The new Strategic Trade Authorization (STA) license exception would allow U.S. exporters to ship products to customers in foreign countries without first applying for and obtaining an individual export license provided the products shipped and circumstances of sale satisfied certain conditions as established in the license exception.

The countries eligible to receive products shipped under authority of license exception STA are organized into three "Tiers." The first and smallest group of 37 Tier 1 countries includes all members of the European Union other than Cyprus and Malta. A second and slightly larger Tier adds Albania and Israel to the Tier 1 countries. The largest group of Tier 3 countries adds 125 countries to the list of 39 included within Tiers 1 and 2. Cyprus is not included even in a group of Tier 3 countries, however. Rather, it is one of only 35 other countries such as Iran, North Korea, Libya, Somalia, Sudan, Syria, Venezuela and Zimbabwe, which are simply ineligible to receive products exported from the U.S. under authority of license exception STA.

When officials from the Cyprus Embassy asked officials from the U.S. Departments of Commerce and State why Cyprus was not included among the countries eligible to receive products exported from the U.S. under authority of License Exception STA, one answer they received was that inclusion of Cyprus would somehow be inconsistent with the U.S. policy of denying applications to export military equipment to Cyprus. This paper explains that inclusion of Cyprus among the countries eligible to receive products exported under authority of License Exception STA would have absolutely no impact upon that U.S. policy.

Exports from the United States of products, services or technical data that are uniquely military are regulated under the International Traffic in Arms Regulations.² The EAR are the more general body of export regulations that govern the export from the United States of "dual use" items, software and technology, *i.e.*, items, software and technology that may have a potential military application but are not designed, manufactured or modified for a uniquely military use. It is important at the outset to recognize that a given product is subject either to the ITAR or the EAR, but never to both. *See*, 15 CFR § 734.3 (The EAR do not govern exports of products, services or technology that are subject to the ITAR); 22 CFR § 120.3 (a "dual-use" item remains subject to the EAR even if it is intended for a military use after its export).

On December 18, 1992, the Department of State published in the Federal Register a notice that declared it the policy of the U.S. government to deny applications for licenses and other approvals

¹ 15 CFR Parts 730-774 (EAR).

² 22 CFR Parts 120-130 (ITAR).

to export or otherwise transfer defense articles and services to any of the armed forces in Cyprus. The U.S. government opposes such exports because of their ability to contribute to an arms race, to further the severance or division of Cyprus, and to hinder U.N. and U.S. efforts to reach a fair and permanent settlement of the Cyprus dispute. Accordingly, this action affected manufacturing licenses, technical assistance agreements, technical data, and commercial military exports of any kind subject to the Arms Export Control Act and the ITAR.

By its terms, the policy announced by the State Department in 1992 is limited to items, technology and services that are regulated for export purposes under U.S. law by the ITAR. The policy was adopted pursuant to the Arms Export Control Act, the federal statute that is implemented by the ITAR, and the 1992 notice states that it affects exports subject to the Arms Export Control Act. As explained above, however, a given export from the United States is subject either to the ITAR or the EAR, not both. Thus, an amendment to the EAR adopted by the U.S. Department of Commerce can have no affect whatsoever on the policy announced in 1992 by the State Department insofar as that policy is explicitly limited to exports governed by the ITAR. Thus, amending licensing policies by rendering Cyprus eligible for exports under a license exception under the EAR has no impact whatsoever on the State Department's ability to continue its enforcement of the U.S. arms embargo under the ITAR.

The United States is party to the Wassenaar Arrangement, one of several multi-lateral export control regimes. Agreements reached among Wassenaar Arrangement countries can apply broadly to products that are regulated for export purposes under U.S. law by either the EAR or the ITAR. In 2003, the Wassenaar Arrangement countries agreed to a Statement of Understanding, which applies when there is a binding United Nations Security Council arms embargo or a regional arms embargo to which a Wassenaar Arrangement country has agreed to comply. A copy of that statement of understanding is attached. When the Statement of Understanding applies, a Wassenaar Arrangement country must take measures to ensure its regulations require authorization for the transfer of certain items when those items are or may be intended for a military end use. Thus, if there were a U.N. or a regional arms embargo on Cyprus, under the Statement of Understanding, the United States might be obliged to review individually applications for a license to export to Cyprus, not only products subject to the ITAR, but products subject to the EAR as well. In fact, however, the Statement of Understanding simply does not apply in the case of Cyprus as there is no U.N. Security Council arms embargo on Cyprus, nor is there any relevant regional arms embargo. Thus, the Wassenaar Arrangement Statement of Understanding cannot be relied upon by the U.S. to justify the continued exclusion of Cyprus from eligibility under proposed license exception STA.

**Statement of Understanding
on
Control of Non-Listed Dual-Use Items⁽¹⁾**

(Agreed at the 2003 Plenary)

Participating States will take appropriate measures to ensure that their regulations require authorisation for the transfer of non-listed dual-use items to destinations subject to a binding United Nations Security Council arms embargo, any relevant regional arms embargo either binding on a Participating State or to which a Participating State has voluntarily consented to adhere, when the authorities of the exporting country inform the exporter that the items in question are or may be intended, entirely or in part, for a military end-use.*

If the exporter is aware that items in question are intended, entirely or in part, for a military end-use,* the exporter must notify the authorities referred to above, which will decide whether or not it is expedient to make the export concerned subject to authorisation.

For the purpose of such control, each Participating State will determine at domestic level its own definition of the term "military end-use".* Participating States are encouraged to share information on these definitions. The definition provided in the footnote will serve as a guide.

Participating States reserve the right to adopt and implement national measures to restrict exports for other reasons of public policy, taking into consideration the principles and objectives of the Wassenaar Arrangement. Participating States may share information on these measures as a regular part of the General Information Exchange.

Participating States decide to exchange information on this type of denials relevant for the purposes of the Wassenaar Arrangement.

⁽¹⁾ See also the List of Advisory Questions for Industry (page 51) agreed at the 2003 Plenary in conjunction with this SOU.

* Definition of military end-use
In this context the phrase military end-use refers to use in conjunction with an item controlled on the military list of the respective Participating State.